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IN THE SUPREME COURT
of the United States

..... TERM, ...

IN THE MATTER OF THE PETITION OF NEW ENGLAND FISH CO. OF OREGON, a corporation, owner, and NEW ENGLAND FISH COMPANY, a corporation, charterer, of the American Diesel Fishing Tender O. M. ARNOLD, for limitation of liability.	CLAIM OF HAZEL KRUSE and CARL J. HANSEN Personal Representatives of dependents of deceased seamen, to recover damages for their wrongful death.

PETITION FOR WRIT OF CERTIORARI
To the United States Circuit Court of Appeals for the Ninth Circuit

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TO THE HONORABLE CHIEF JUSTICE AND THE ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

SUMMARY STATEMENT OF MATTER INVOLVED

The owner and charterer of the Diesel Fishing Tender O. M. ARNOLD sought to limit their liability under the provisions of the Limitation of Lia-

bility Act. After setting up the incorporation of the owner and charterer of the fishing tender, it was alleged that on August 17, 1939, the vessel was wrecked when on a voyage to gather fish in Chatham straits, and was a total loss, and that certain members of the crew lost their lives, and that certain suits in personam in admiralty had been filed in the court wherein limitation was sought, by the personal representatives of the deceased seamen to recover damages, and it was alleged that these claims exceeded the value of the interest of the owner and charterer in the tender, and that they desired to claim the benefits of the provisions of the Limitation of Liability Act, and to contest their liability, and the liability, if any, of the tender, and made the usual prayer for exoneration and limitation of liability.

Hazel Kruse, as administratrix of the estate of Ernest Kruse, deceased, Carl J. Hansen, as administrator of the estate of Andrew Lee, deceased, and of the estate of George Lee, deceased, drowned members of the crew, separately filed answers and claims to the petition. These personal representatives, on behalf of the widow and dependents, denied that the tender was seaworthy, and alleged that with the privity and knowledge of the owner and charterer, the O. M. ARNOLD was sent out to open sea, and by reason of the unseaworthy condition of the tender, and the negligence of the owner and charterer, and the negligent navigation of the tender, Kruse

and the Lees lost their lives, and they filed claims as widow and dependent relatives, through a personal representative appointed by the probate courts of Oregon, to recover damages for their wrongful deaths, under the provisions of the Jones amendment to the Seamen's Act, granting a right of action to recover damages for heirs and dependents as designated by the statute. These are the petitioners herein.

The owner and charterer filed Exceptions to the answers and claims on the grounds that the court wherein the limitation was filed has no jurisdiction over the personal representatives or their claims, and on the ground that they had no standing, right or qualification to appear in the proceedings or to make any claim.

Other exceptions were made as to the sufficiency of the claims to state a defense or constitute a claim, which are not deemed material to this appeal, and were not ruled on by the trial court.

This exception was submitted to the court on argument and brief, and the court rendered an opinion in which it was held:

"———

> In view of the established rule of this Court (The Princess Sophia, 35 F.2d, 736; petition for rehearing denied, 36 F.2d, 591; affirmed 61 F.2d, 339, at 354), petitioners' Exception I to the Answers and Claims of claimants will be sustained. This renders unnecessary a ruling upon the further exceptions.

An order may be settled upon notice or stipulation."

On the 4th day of August, 1941, notice was given to claimants' proctors that proctors for petitioners in limitation would present to the court for signature a Decree sustaining these exceptions, and a copy of the proposed Decree accompanied the notice. The form of Decree sustained the exceptions and dismissed the claims, with costs to petitioners.

Claimants filed objections to the form of Decree and requested that claimants be allowed within ten days the right to amend their claims by substituting an administrator or personal representative appointed by the courts of the State of Washington, in lieu of the administrator appointed by the courts of the State of Oregon, and also to strike out that portion of the decree providing that the claims be dismissed with costs to petitioners.

The court heard argument on the objections and over-ruled the same, and a final Decree dismissing the claims was entered on the 25th of August, 1941.

On October 3, 1941, an appeal was allowed, and the case proceeded to the Circuit Court of Appeals. The case was duly presented to the Court of Appeals and on the 22d day of April, 1942, that Court rendered a written opinion.

No finding was made in the opinion as to the right of the Oregon administrators to maintain the

claims on behalf of the dependents in the Limitation proceeding. The Court ruled as follows:

> "A form of decree was lodged in the court below, to which claimants objected on the ground that the order of dismissal should provide that the claimants might amend by substituting personal representatives appointed in Washington. The objections were over-ruled and the claims dismissed.
>
> "Claimants contend here that they should be entitled to properly present their claims, but they would be prevented from doing so because the order is res judicata. While it seems clear that the order would not prevent other parties from filing claims, (that is personal representatives appointed in Washington) we see no reason why the order appealed from could not state that the dismissal is without prejudice to the filing of claims by representatives appointed in Washington. The order is so modified, and as modified is affirmed."

On April 27, 1942, a letter was addressed to the clerk, Paul P. O'Brien, Esq., in which inquiry was made regarding the taxation of costs, and the further inquiry

> "The application to the District Court, refused by that court and allowed by the Court of Appeals, was to permit the claimants to amend their answers and claims filed in the limitation proceeding by substituting administrators to be appointed in the State of Washington. It is not clear in my mind from the last paragraph of the opinion whether the Court intended the claimants to file new claims, or to be permitted to substitute Washington administrators, as was done in Rejsenhoff v. Colonial

> Navigation Co., 35 F. Supp. 577; Dietel v. Gleason, 22 F. Supp. 355; also see 67 S. 68, and authorities cited on memorandum handed up on day of trial."

A reply to this letter was written by proctor for petitioners, in which he stated as follows:

> "The last paragraph in counsel's letter strikes us as a refusal to believe or understand the clear purport of the opinion filed. If the question of substitution to which counsel refers and cites cases, were to be thus re-argued, which we assume it is not, the cited cases would be found distinguished in the same manner as the other cases cited in appellants' Brief. None of them involve substitution of entirely different persons as parties to the action, and do not impair the rule of this Circuit in *The Princess Sophia*, 36 F.2d, 591, 61 F.2d, 339, cited at page 30 of appellees' brief."

Before the expiration of the time for filing a petition for rehearing, a motion was filed with the clerk, requesting extension of time within which to file such petition for a modification of opinion and judgment, and objection to the taxation of costs, and this was denied by the court. On May 22, 1942, a motion was filed to amend the decree and for retaxation of costs. This in effect was a petition for rehearing and was filed within the time fixed by Rule 25 of the Court.

A memorandum was filed in which it was called to the court's attention that the order of dismissal by the trial court acted as *res judicata*, and it was

argued that the Oregon administrators were in privity with the statutory beneficiaries, and it was pointed out that the Court should unqualifiedly direct that claimants be permitted to file amended claims by Washington administrators, either by substitution or new claims, and that the recital in the District Court's decree that the claims be dismissed be deleted; that the terms of this decree that forced an appeal because they were met with the objections that the time limit for filing the claims in the Limitation proceedings had expired on March 25, 1940, and that claimants would be met with the contention that the claims had already been adjudicated. Claimants then proceeded to argue the question of the taxation of costs, and there was a separate application to the trial court in respect to the terms of the mandate. It was requested that the mandate specifically follow the relief prayed for in claimants' objections and motion in respect to the form of decree of the District Court. It was prayed that claimants be permitted to file amended claims in the Limitation proceeding by substituting Washington administrators, and it was said that this was the purpose of the appeal, and furthermore, that the mandate should recite the affirmance of the District Court's decree without prejudice. The Court had before it the letter of April 27, 1942, and the letter of proctors for petitioners dated April 29, 1942, as well as the supplemental brief citing Dietel v. Gleason, 22 F. Supp. 355 at 357, where it was held under the same contention,

> "The motion to dismiss for lack of capacity to sue will be granted, with leave to the plaintiff to serve an amended complaint or to commence a new suit in case she shall take out ancillary letters of administration here."

and Rejsenhoff v. Colonial Navigation Co., 35 F. Supp. 377. 579, where the same contention was made and sustained regarding actions by foreign administrators under the Jones Act,

> "We will dismiss the complaint as it stands with leave to amend within thirty days. Within that time plaintiff may discover facts that will permit an allegation that plaintiff's intestate suffered his fatal injury in New York. Otherwise, she may equip herself with ancillary letters and allege that fact. Plaintiff's qualification for ancillary administration here will work no change in the cause of action and the statute of limitations will not apply. Rule 15 (c). (citing cases)"

Petitioners filed a memorandum in which, among other things, it was stated as follows:

> "The modification made of the lower court's decree is one of form only. It neither adds to nor detracts from the decree entered below, as respects any substantial right. Appellants are the only ones who have made any suggestion that the decree entered below would operate as res judicata or with prejudice to the filing of claims by any parties other than the Oregon personal representatives who are disqualified by the decree. It was never supposed, suggested, or contended by appellees that the decree below would have such effect. - - - - We submit that the objections filed by appellants below

to the form of decree did not raise any question or opposition to the effect that the decree would operate with prejudice or as res judicata. If they had done so, or if appellants had requested below that the words 'without prejudice' be added to the decree, such modification would have been granted without opposition or question, for, in our opinion, such modification does not alter the effect of the decree in any way.

"The opinion filed by this Honorable Circuit Court, in our opinion, leaves appellants in exactly the same position they were in before the appeal was taken."

The Court took the matter under advisement but on June 2, 1942, denied the motion to modify the decree, and also denied the objections to taxation of costs.

It is our contention that these motions were in point of fact applications for rehearing and reconsideration of the appeal, and the Court having taken the matter under consideration, passed upon the applications, and the time for taking an appeal under Title 28, Section 250 of the Judicial Code would not commence to run until the 4th of June, 1942, and therefore this appeal is within time.

JURISDICTION

The decree was entered in the United States District Court for the Western District of Washington, Northern Division, on the 25th day of August, 1941, dismissing the claims. The appeal to the United States Circuit Court of Appeals for the Ninth Cir-

cuit was perfected on the 17th day of November, 1941. The opinion (127 F.2d, 648) was entered on the 22d day of April, 1942. Letters to the clerk of the Court of Appeals in relation to the form of the mandate of that Court filed by the claimants about April 29th, and answers thereto were filed by petitioners on or about the first of May. On May 22d claimants filed a motion with the Court which in form amounted to an application for rehearing and reconsideration of the order of April 22, 1942, as previously referred to, which was denied by the Court on June 2d. This was in time under Rule 25. The time for filing petition for certiorari will expire on September 2d, 1942, if the time is computed from denial of the motions on June 2d.

The jurisdiction of this Court is invoked under Title 28, Sections 347, 350, U.S.C.A.

QUESTIONS PRESENTED

I.

Whether a personal representative of a deceased seaman appointed by the probate courts of the State of Oregon could deny the right to limit and maintain a claim for the wrongful death under the Jones Act in a Limitation of Liability proceeding filed in the State of Washington, without the appointment of a personal representative by the probate court of the State of Washington.

II.

Whether the court should have directed, on claimants' application being made therefor, that an amendment be made to the claims permitting the claimants to substitute personal representatives appointed by the probate courts of the State of Washington in the limitation proceedings.

III.

Whether the United States Circuit Court of Appeals did not err in not specifically directing the District Court to permit claimants to substitute Washington administrators in lieu of the Oregon administrators in the claims that had already been filed, and that the claims of the Oregon administrators should not be dismissed, and that the particular relief prayed for upon objection to the form of decree in the District Court should be allowed.

IV.

The time for the filing of claims in the Limitation proceeding having expired, if new claims were ordered to be filed, whether the claims should not be filed *nunc pro tunc* as of the date of the expiration of the time for filing claims, namely, March 25, 1940.

V.

Whether the Court of Appeals in any event did not err in respect to the taxation of costs against the claimants.

VI.

Whether penalty for co-ercing appeal on insub-

stantial question should not have been imposed in Circuit Court of Appeals and this Court.

REASONS RELIED ON FOR ALLOWANCE OF THE WRIT

I.

Importance to the Claimants

The claims having been filed in time, the action of the District Court in entering a dismissal of the claims acted as res judicata as to any right to file a claim subsequently on behalf of the dependent heirs by Washington administrators, because these dependent heirs were in privity with any administrator appointed in the State of Washington and necessitated an appeal. See Chicago etc. R. Co. v. Schendel, 270 U.S. 611. The form of the decree, therefore, was fatal, and the refusal of the trial court to permit a revision of the decree so as to enable claimants to effect the substitution as applied for, was capricious, particularly in view of the diversity of opinion as to the right of a foreign administrator under the Jones Act, and the Railway Employers' Liability Act, to maintain an action in another jurisdiction without the appointment of an ancillary or local administrator.

This refusal amounted to an outlawing of the claimants' claims in the Limitation proceeding. This was particularly arbitrary in view of the established precedents in other jurisdictions namely:

Rejsenhoff v. Colonial Navigation Co., 35 F. Supp. 577; Dietel v. Gleason, 22 F. Supp. 355. These matters were fully presented to the Court of Appeals, both by memorandum and by argument and citation of authorities. The Court of Appeals, instead of passing on the right of Oregon administrators to maintain the claims in the courts of Washington, failed to rule directly on the question, but made the observation that it did not see how the claims of dependents could be *res judicata* if they were subsequently filed by Washington administrators, thereby in effect confirming the ruling of the court on this point. This, as shown by the Schendel case, supra, was clearly error. An appeal having been forced on claimants, the Circuit Court of Appeals should have made specific provision that the District Court should in any event allow the substitution of Washington administrators as prayed for. It is apparent that this application for substitution in the District Court was made solely for the purpose of removing the controverted question of the right of the Oregon administrators to maintain claims in the Limitation proceeding filed in the State of Washington, and the Court should have held that no ruling would be made upon this question, but claimants should be permitted to make the substitution. The effect of the Court's ruling was to leave undecided the matter as to whether or not the claims of the beneficiaries of deceased seamen should be permitted to be filed out of time or as late claims or

by way of substitution. Their rights to maintain their claims in Limitation should not thus be permitted to rest in the discretion of a District Judge, because their rights were already consummate by the claims already filed in the Limtitation proceedings by Oregon administrators.

II.

Conflict of Decisions Requires Clarification By This Court

Actions for wrongful death of seamen during the course of their employment are exclusively for the benefit of statutory heirs. The Federal Employer's Liability Act, (45 U.S.C.A. 51), Lindgren v. U.S., 281 U.S. 45; Southern R. Co. v. Stewart, 115 F.2d, 521; Jones Act, 46 U.S.C.A. Sec. 688. The creditors have no interest in any recovery made, and the plaintiff, in cases brought under these statutes, is merely a trustee. Many Federal and state courts have held that the principle of law that a non-resident personal representative cannot maintain an action in a foreign jurisdiction, does not apply.

In fact, a review by this Court was sought on this very point in the Mississippi case of Gulf M. & N. R. Co. v. Wood, 289 U.S. 759. The case was brought in Mississippi under the Federal Employer's Liability Act by a Tennessee administratrix, without ancillary letters being taken out, and the state court held that the Tennessee administratrix could maintain the action in Mississippi. It was held that

the Federal statute had created the personal representative as a statutory agent or trustee, not of the estate of the decedent, but of those entitled to participate in the benefits of the recovery.

There are a number of Federal and state decisions and texts that sustain this rule: Stumberg, Principles of Conflict of Laws, 176; Goodrich, Conflict of Laws, 213; 31 Harvard Law Review, 1161; 16 American Jurisprudence, pp. 184, 185; Pan Two, 26 F. Supp. 990; Gulf M. & N. R. Co. v. Wood, 146 S. 298, (cert. denied 289 U.S. 759); Kirincich v. Standard D. Co., 27 F. Supp. 219; Pearson v. Norfolk etc. R. Co., 286 F. 429; Rose v. Phillips Packing Co., 21 F. Supp. 485; DeMattei v. Missouri etc. R. Co., 139 S.W.2d, 504; Wells v. Davis, 261 S.W. 58; Shaw v. Chicago etc. R. Co., 282 S.W. 416.

Opposed to this view there are a number of state and Federal decisions and texts. See Beal, Conflict of Law, Vol. II Sec. 396.1, pages 1313, 1315; Brooks v. S. P. Co., 148 F. 986; Brown v. Boston & M.R.R. Co., 283 Mass. 192, 186 N.E. 59; Rejsenhoff v. Colonial Navigation Co., 35 F. Supp. 577; Dietel v. Gleason, 22 F. Supp. 355.

These authorities are in irreconcilable conflict. The conflict cannot be explained or reconciled by the edicts of text writers and some judges that there is no conflict but in jurisdictions in which foreign administrators have been permitted to sue without securing ancillary administrators, there has been a

permissive statute. Such declarations are not borne out by the decisions. Their authority to maintain the suit is not derived from any state law, but is a Federal statutory right and power given to carry out the policy of a Federal statute. Ancillary letters are not necessary because the right of action given is not an asset of the estate and that is the purpose of ancillary proceedings. It is said the failure to distinguish between the special character of the personal representative as a trustee in these classes of cases and the ordinary common-law functions of an administrator has caused a diversity of judicial opinion with respect to the right of a foreign administrator to maintain the suit. However, the cases and judicial utterances are in hopeless conflict and it is therefore important that this question be finally decided. The denial of certiorari in the Wood case, supra, cannot be said to be an expression of opinion by this Court.

It is not to be lost sight of that the question was directly raised in Southern R. Co. v. Painter, 86 L. Ed. 123; and this Court proceeded to decide that case on the merits without reference to the question.

III.

Arbitrariness of Taxation of Costs

The question of costs taxed in Limitation proceedings against claimants by the Court of Appeals is so at variance with such established precedents as The Strathleven, 213 F. 979; The Edw. S. Mur-

ray, 278 F. 895, 900, that a decision should be rendered which will be a guiding principle for courts of appeals regarding the taxation of costs in admiralty in limitation proceedings. The taxation of costs here was so arbitrary and oppressive that this alone would warrant a review by this court. Furthermore, whether the projecting of an insubstantial question as to a proper party and an offer to correct it does not require the imposition of a penalty.

IV.
Jurisdiction

Whether the several applications to the Court regarding terms of the decree, the rulings by the Court thereon amount to a reconsideration of the case by a rehearing is within the rule of Bowen v. Loperena, 311 U.S. 262, is one of importance, justifying assumption of jurisdiction by this Court.

WHEREFORE your petitioners respectfully pray that a writ of certiorari be issued out of and under the seal of this Honorable Court, directed to the United States Circuit Court of Appeals for the Ninth Circuit, commanding that court to certify and send to this Court for this review and determination, on a day certain to be therein named, a full and complete transcript of the record and all proceedings in the case numbered and entitled on its docket No. 9977, In the matter of the Petition of New England Fish Company of Oregon, a corporation, owner, and New England Fish Company, a corporation, chart-

erer, of the American Diesel Fishing Tender O. M. ARNOLD, for limitation of liability, and that the said decree of the said United States Circuit Court of Appeals for the Ninth Circuit may be reversed by this Honorable Court, and that your petitioners may have such other and further relief in the premises as to this Honorable Court may seem meet and just, and your petitioners will ever pray.

WM. P. LORD
JAMES W. MIFFLIN
BEN ANDERSON
Proctors for Petitioners herein.